

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1217

COMMONWEALTH

vs.

LARRY C. AHART.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant, Larry C. Ahart, appeals from an order denying his motion to vacate a probation revocation order and sentence and from an order denying his motion for reconsideration. As the papers on file show that the defendant stipulated to the violation and the defendant has produced no evidence showing an objection to the lack of written notice or that he was prejudiced by any lack of notice, we affirm.

We review the denial of a motion under Mass. R. Crim. P. 30, as appearing in 435 Mass. 1501 (2001), for a "significant error of law or other abuse of discretion." Commonwealth v. Williams, 71 Mass. App. Ct. 348, 353 (2008), quoting Commonwealth v. Milley, 67 Mass. App. Ct. 685, 687 (2006).

Accord Commonwealth v. Wilmer, 480 Mass. 1, 4 (2018).¹ Due process entitles a defendant to written notice of the alleged violation of probation. See Commonwealth v. Wilcox, 446 Mass. 61, 66 (2006). Due process, however, "is not an inflexible concept." Commonwealth v. Simon, 57 Mass. App. Ct. 80, 85 (2003). A defendant may waive the notice requirement by stipulating to a violation. See Commonwealth v. Bowen, 92 Mass. App. Ct. 793, 794 (2018) (defendant stipulated to probation violation and received additional year of probation with modified conditions). Cf. Dist./Mun. Cts. R. Prob. Viol. P. 3 (b) (iii), 4 (d) (defendant may waive seven-day notice requirement for hearing). Furthermore, to obtain relief, a defendant must "demonstrate prejudice resulting from any lack of notice, and . . . failure to show prejudice is fatal to his claim of error." Simon, supra at 86. Here, the defendant has failed to show either that he objected to the lack of notice or

¹ We assume without deciding that this was a proper vehicle to challenge the probation violation finding. Cf. Commonwealth v. Hernandez, 441 Mass. 1014, 1015 (2004) ("the matter was concluded when the defendant failed in a timely manner to appeal from, or seek reconsideration of, the . . . order revoking his probation and ordering him committed"). Similarly, we assume without deciding that the question is not moot, despite the defendant's guilty pleas to new charges. Cf. Commonwealth v. Pena, 462 Mass. 183, 187 (2012) ("Certainly subsequent convictions or guilty pleas render moot an appellate claim that a judge erred in determining that a probationer had violated the conditions of his probation by committing a new offense").

that he was prejudiced. Accordingly, the judge acted within her discretion in denying the defendant's motion.

The defendant was issued two notices of probation violations, one alleging that he committed the offenses of assault by means of a dangerous weapon and threatening to commit a crime, and the second alleging that he committed the offense of possession of a class B substance and committed moped violations. On July 19, 2004, the defendant pleaded guilty to all of these charges except the moped violations. On the same day, the judge completed a form entitled, "Probation Revocation Proceedings Findings and Orders." The judge noted that the defendant violated his probation by "a guilty finding" and what appears to be the words, "Drug Testing." The judge wrote that these violations were based on "stipulation of [d]efendant plus pleas before me to new charges." As the defendant has produced no evidence rebutting the judge's findings, he has failed to demonstrate that he made any objection to proceeding without further notice. Cf. Commonwealth v. Morse, 50 Mass. App. Ct. 582, 586 (2000) (failure to move for continuance waived objection to insufficient notice of hearing).

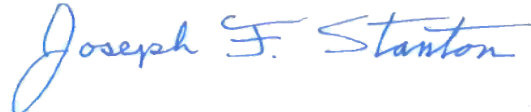
Furthermore, the defendant has failed to "demonstrate prejudice resulting from any lack of notice." Simon, 57 Mass. App. Ct. at 86. Where the defendant stipulated to the violation and simultaneously pleaded guilty to committing three new crimes

while on probation, the absence of even a self-serving affidavit explaining how he was prejudiced by any lack of notice is fatal to his claim. Cf. Commonwealth v. DeJesus, 71 Mass. App. Ct. 799, 811 (2008) (judge properly denied defendant's rule 30 [b] motion that was not supported by affidavit or other corroborating documents). Without any showing that the defendant was prejudiced, the judge acted within her discretion in denying his motion. See Commonwealth v. Bain, 93 Mass. App. Ct. 724, 727 (2018) (no error where "defendant came prepared"). Accord Simon, supra (no prejudice where defendant was prepared to address issue not included in probation violation notice); Morse, 50 Mass App. Ct. at 588. Cf. Commonwealth v. Streeter, 50 Mass. App. Ct. 128, 131 (2000) (reversing where defendant did not receive written notice of alleged violations and was not

"able to prepare a meaningful defense").²

Order denying motion to
vacate probation revocation
order and sentence, and
order denying motion to
reconsider affirmed.

By the Court (Henry, Sacks &
Ditkoff, JJ.³),



Clerk

Entered: August 22, 2019.

² Because nothing turns on the precise timing of the probation violation hearing, the defendant's motion to remand for a District Court judge to determine when that hearing occurred is denied.

³ The panelists are listed in order of seniority.